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IN THE
Supreme Court of the United States

DELAWARE RIVER PORT AUTHORITY,
Petitioner,

v.

FRATERNAL ORDER OF POLICE
PENN-JERSEY LODGE 30, AND JOSEPH VENA,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey Appellate Division

BRIEF *AMICUS CURIAE* OF THE DELAWARE RIVER AND BAY AUTHORITY IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE DELAWARE RIVER AND BAY AUTHORITY IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* THE DELAWARE RIVER AND BAY AUTHORITY[1]

The Delaware River and Bay Authority ("DRBA"), like the Delaware River Port Authority ("DRPA"), is the creature of a compact entered into by two states, by and with the consent

[1] Counsel for both the Petitioner and Respondents have consented to the filing of this brief. Letters of consent will be filed with the Clerk of the Supreme Court simultaneously with the filing of this brief. Counsel for the Delaware River and Bay Authority authored this brief in whole and no person or entity, other than the Delaware River and Bay Authority and its counsel, made a monetary contribution to the preparation or submission of this brief.

of Congress as required by Article I, Section 10, Clause 3 of the Constitution (the "Compact Clause"). In 1961, in order to facilitate interstate transportation across the Delaware River and Bay and promote economic growth, Delaware and New Jersey formed a Compact and enacted virtually identical enabling legislation to create the DRBA. *See* Del. Code Ann. tit. 17, § 1701 *et seq.*; N.J. Stat. Ann. § 32:11E-1 *et seq.* Congress formally gave its consent to the Compact a year later when it passed a Joint Resolution which incorporated the terms of the Compact and thereby established the DRBA as "as an agency of government" of both states and empowered it with the "essential government functions" necessary to effectuate the purposes of the Compact. H.R.J. Res. 783, Pub. L. No. 87-678, 76 Stat. 560 (1962). In 1990, Congress approved amendments to the Compact that expanded the DRBA's authority to undertake certain economic development projects. *See* H.R.J. Res. 657, Pub. L. No. 101-565, 104 Stat. 2784 (1990); 67 Laws of Del., ch. 252; 192 Laws of NJ, ch. 192.

The DRBA today employs more than 500 people in New Jersey and Delaware. Its facilities include the Delaware Memorial Twin Bridges, four airports, two passenger ferry terminals, berthing docks, five ferries, a business center, and administrative buildings. Each year, more than 15 million vehicles cross the Delaware Memorial Twin Bridges and almost 1.3 million passengers ride on the ferry service operated by the DRBA between Cape May, New Jersey and Lewes, Delaware. To protect its passengers, facilities, and employees, the DRBA has an accredited police force, with 60 officers and its own police training academy.

The DRBA respectfully urges the Court to grant the DRPA's Petition for a Writ of Certiorari to review the decision of the New Jersey Superior Court's Appellate Division. That decision ignores the explicit and carefully considered provisions of a compact formed by two sovereign

states and approved by Congress and establishes a precedent harmful to all Compact Clause entities with operations in New Jersey.

SUMMARY OF ARGUMENT

The Appellate Division's decision undermines the principles underlying this Court's Compact Clause cases and directly conflicts with the decisions of other federal and state courts, including the courts of Delaware, Pennsylvania, and New York, all of which participate in Compact Clause entities with operations in New Jersey. If allowed to stand, the Appellate Division's decision will subject interstate agencies, like the DRBA, to the prospect of a single state court judge unilaterally imposing on them obligations and duties never agreed to by their creator states and never approved by Congress. That prospect creates enormous confusion and uncertainty as to what laws apply to interstate agencies and has profound and disruptive consequences on the daily operations of those agencies. This Court should therefore grant the petition for a writ of certiorari.

ARGUMENT

I. THE APPELLATE DIVISION'S DECISION UNDERMINES THE PRINCIPLE OF STATE SOVEREIGNTY UNDERLYING THE COMPACT CLAUSE AND EMBODIED IN THE DRPA'S AND DRBA'S COMPACTS

Compact Clause entities play a unique and significant role in resolving regional problems through cooperation by states. In enacting the Compact Clause, "'[t]he framers * * * astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment.'" *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275, 282 n. 7 (1959) (*quoting* Felix M. Frankfurter & James M. Landis, *The Compact Clause of the*

Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 695 (1925)). Fundamental to this "mechanism of legal control" is the principle that a single state cannot regulate or control a Compact Clause entity. This principle animates this Court's Compact Clause decisions. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994) ("bi-state entities created by compact . . . are not subject to unilateral control of any one of the [compact] States"); *id.* at 47 ("no one State can control the course of a Compact Clause entity"); *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 172 (1985) ("classic indicia of a compact are missing" where "each State is free to modify or repeal its law unilaterally"); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 315 (1990) (Brennan, J. concurring in part and concurring in judgment) ("it is not within the autonomous power of any State to create and regulate an interstate agency"). It is also incorporated as a standard provision in more than 50 interstate compacts approved by Congress. *See* Pet. 5 n. 5. Article VIII of the DRBA Compact, for example, explicitly prevents *either* Delaware or New Jersey from imposing upon the DRBA "additional duties or obligations . . . without authorization by the law of *both* States." (Emphasis added.)

The Appellate Division's decision ignores this fundamental precept. Its holding subjects interstate entities like the DRBA to any number of obligations and duties inferred by a single state court from the "policies" of the compact states which created the entities, even where those putative policies are not specifically made applicable to the interstate entities by the compact states or Congress. That holding directly conflicts with the decisions of the federal and state courts in New York, Pennsylvania, and Delaware, all of which have formed with New Jersey Compact Clause entities. *See Malverty v. Waterfront Comm'n of New York Harbor*, 524 N.E.2d 421, 422 (N.Y. 1988) (recognizing fact that "two [compact] States have evinced the same, or similar, public policy . . . by

enacting similar . . . laws is *not* sufficient . . . to render [a compact] properly amended or supplemented" and refusing to subject Port Authority of New York and New Jersey to states' laws prohibiting employment discrimination against convicted felons) (emphasis added); *Nardi v. Delaware River Port Auth.*, 490 A.2d 949, 950 (Pa. Commw. Ct. 1985) (recognizing that "neither creator state can unilaterally impose additional duties, powers or responsibilities upon the [DRPA]," and refusing to subject DRPA to states' employee disability benefits laws); *Delaware River & Bay Auth. v. Carello*, 222 A.2d 794, 799 (Del. Ch. 1966) (recognizing that "[t]he power over [DRBA] employees thus placed in the hands of the [DRBA] Commissioners may not be impaired or diluted by the unilateral action of one member to the compact" and refusing to subject DRBA to state collective bargaining obligation); *Baron v. Port Auth. of N.Y. & N.J.*, 968 F. Supp. 924, 928-30 (S.D.N.Y. 1997) (recognizing that Compact Clause entities "are not subject to the unilateral control of any one of the [compact] states" and refusing to subject Port Authority of New York and New Jersey to jurisdiction of states' anti-discrimination agencies); *Pilla v. Del. River Port Auth.*, 1999 WL 345918, at *3 (E.D. Pa. May 7, 1999) (rejecting "New Jersey's more permissive view" that court can infer an intent to amend compact from "some showing of agreement in the [compact states'] laws involving and regulating a bi-state agency" and refusing to subject DRPA to states' disability and sexual anti-discrimination laws). The Appellate Division's decision thus contravenes this Court's Compact Clause precedents, directly conflicts with the holdings of other federal and state courts, and undermines the sovereignty principle essential to the existence and utility of Compact Clause entities.

Interstate entities would neither exist nor function properly if a single state could impose unilaterally obligations and duties on and thereby control such entities. Because a state necessarily surrenders a portion of its sovereignty when it

joins an interstate compact, it would not agree to form a compact without a precise delineation in the compact of the areas over which it has yielded its authority and a guarantee that the terms of the compact could not be modified without its consent. "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States." *West Virginia ex rel. Dyer v. Simes*, 341 U.S. 22, 28 (1951). Simply put, "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Id.*

Consistent with this basic sovereignty principle, this Court has required strict enforcement of the terms of interstate compacts. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (interstate compact "must be construed and applied in accordance with its terms"); *Texas v. New Mexico*, 462 U.S. 554 (1983) ("no court may order relief inconsistent with [an interstate compact's] express terms"); *Oklahoma v. New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, J.J., concurring in part and dissenting in part) ("where the terms of the compact are unambiguous, this Court must give effect to the express mandates of the signatory States"). As noted above, cognizant of this Court's precedents, states have uniformly insisted that their compacts contain provisions which require the consent of all of the compacting states to modify the terms of a compact. *See* Pet. 5 n.5. The states have also carefully structured their compacts to account fully for their interests in any action taken pursuant to the compacts. Under the terms of the DRBA's Compact, for example, twelve commissioners, six selected by each State, govern the DRBA. *See* DRBA Compact art. V; Del. Code Ann. tit. 17, §§ 1701, 1711, 1714; N.J. Stat. Ann. §§ 32:11E-1, 32:11E-2. Each state may remove the commissioners it appoints. *See* DRBA Compact art. V; Del. Code Ann. tit. 17, §§ 1701, 1716; N.J.

Stat. Ann. §§ 32:11E-1, 32:11E-4. Any action taken by the DRBA must be approved by at least four commissioners from each state and the governor of either state may cancel the vote of any one or more of its own commissioners. DRBA Compact art. VI; Del. Code Ann. tit. 17, §§ 1701, 1720; N.J. Stat. Ann. §§ 32:11E-1, 32:11E-6. Thus, each governor can effectively veto any action taken by the DRBA. These provisions were intended to ensure that neither New Jersey nor Delaware would be in a position to foist its will on the DRBA or the other compact state. The DRPA Compact contains similar provisions to protect and balance the interests of Pennsylvania and New Jersey. *See* Pet. 5.

The Appellate Division's decision to compel a bi-state agency to submit to binding interest arbitration disrupts the carefully balanced structures embodied in the DRPA Compact and the other interstate compacts to which New Jersey is a partner. The DRPA compact explicitly requires the "action of either State concurred in by the legislation of the other" to impose additional powers on the DRPA and it unambiguously reserves to the DRPA commissioners the power to "fix and determine" the terms of their police officers' employment. *See* DRPA Compact art. IV(e) (vesting DRPA commission with power "to . . . employ . . . such agents and employees as it may require . . . and fix and determine their qualifications, duties, and compensation"). The Appellate Division's decision effectively eviscerated these provisions from the DRPA Compact. Citing "policies" it inferred from Pennsylvania and New Jersey statutes, which the court itself conceded had "discrepancies" and were not directly applicable to the DRPA, the Appellate Division transferred the power to establish the employment conditions of DRPA's police officers from the DRPA's commissioners to a court-appointed arbitrator.

Under the reasoning of the Appellate Division, the sovereignty of the compact states and the intent of the those

states to apply particular statutes to a Compact Clause entity are of no moment so long as a single state court discerns a common "public policy" in the states' general legislation. The Appellate Division's holding constitutes an affront to the sovereignty of the states which have formed interstate compacts with New Jersey and threatens the very integrity and viability of all Compact Clause entities with operations in New Jersey. This Court should grant the DRPA's petition to free those entities from "the unilateral control," *see Hess*, 513 U.S. at 42, of New Jersey's courts.

II. THE APPELLATE DIVISION'S DECISION ELIMINATES CONGRESS' CONSTITUTIONALLY-MANDATED ROLE IN THE COMPACT AMENDMENT PROCESS

The Compact Clause permits a state to "enter into any Agreement or Compact with another State," but only with "the consent of Congress." U.S. Const. art. I, § 10, cl. 3. "The requirement of congressional consent is at the heart of the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 439 (1981). "By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that *Congress* would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 439-40 (emphasis added). The Appellate Division's decision ignores Congress' constitutionally-mandated role in the Compact amendment process by permitting a single state court to alter the terms of an interstate compact without the consent of Congress. As a result, this Court, either through the exercise of its certiorari jurisdiction, or, in the case of direct disputes between compact states, its original jurisdiction, now retains the "ultimate supervisory power" over Compact Clause entities with operations in New Jersey.

That result, however, conflicts with *Cuyler* and the explicit text of the Constitution.

The Appellate Division's usurpation of Congressional authority is especially troubling because its decision affects federal, not state, law. "[An] [interstate] compact when approved by Congress becomes a law of the United States." *Texas v. New Mexico*, 482 U.S. at 128. In amending the DRPA's Compact, the New Jersey court has in effect made *federal* law. This anomalous result underscores the impropriety of the Appellate Division's holding. Federal law —Article IV(e) of the DRPA Compact and Article I, § 10, cl. 3 of the U.S. Constitution— establishes a legislative process for amending the DRPA's Compact and imposing additional obligations on the DRPA. For this reason, this Court has recognized that it lacks the power to amend an interstate compact:

> Under the Compact Clause, two States may not conclude an agreement . . . without the consent of the United States Congress. However, once given, congressional consent transforms an interstate compact within this clause into a law of the United States. One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, *no court* may order relief inconsistent with its express terms.

Texas v. New Mexico, 462 U.S. at 564 (internal quotation marks and citations omitted) (emphasis added). Thus, in altering the terms of the DRPA's compact, the Appellate Division exercised a power which this Court has deemed beyond the scope of its own judicial authority, let alone the authority of a state court.

III. THE CONFLICT IN AUTHORITY CAUSED BY THE APPELLATE DIVISION'S RULING WARRANTS RESOLUTION BY THIS COURT

The Appellate Division's ruling has profound implications for the DRPA, the DRBA, and numerous other Compact Clause entities with operations in New Jersey. These interstate agencies now face the prospect that a New Jersey court will unilaterally conclude that they are subject to a host of additional obligations and duties never contemplated by their creator states and never approved by Congress. Moreover, until New Jersey's courts determine which public policies inferred from the creator states' legislative schemes actually give rise to additional obligations and duties, the interstate entities must operate under a cloud of uncertainty. The entities are left guessing what these particular obligations and duties are until a New Jersey court infers them from time to time in the context of an ongoing dispute. Even the general nature of the obligations and duties is unclear. Although the Appellate Division's decision specifically addresses the applicability of a labor relations law to a Compact Clause entity, its reasoning extends to laws and regulations relating to any area of an interstate agency's operations, including public bidding for contracts, workers' safety, anti-discrimination efforts, and environmental issues.

At the end of the day, the Compact Clause entities with operations in New Jersey will be subjected to one set of rules by the New Jersey courts, which are willing to infer new obligations and duties from the policies of compact states, and another set of rules by the courts of either Pennsylvania, Delaware, or New York, all of which refuse to amend compacts by policy implication. Because of the conflict and confusion caused by the Appellate Division's ruling, this Court should grant the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, the Delaware River and Bay Authority, respectfully requests that the Court grant the DRPA's Petition for a Writ of Certiorari.

Respectfully submitted,

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